Albany Steel, Inc. *and* Shopmen's Local Union No. 534 of the Bridge, Structural and Ornamental Iron Workers. Case 3–CA–16327

November 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The central question presented here[1] is whether the judge correctly concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on April 1, 1991. In reaching this conclusion, the judge found that the Respondent had failed to prove its affirmative defenses that the Union was defunct and/or that the Respondent withdrew recognition based on objective considerations supporting a good-faith doubt of the Union's continuing majority status.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Albany Steel, Inc., Menands and Glenmont, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(c) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

[1] On January 27, 1992, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In accord with the Respondent's exceptions, we note the following factual errors in the judge's decision:

1. The judge mistakenly stated that Union Administrator Thomas knew the Respondent's views expressed in a November 27, 1990 letter when Thomas sent a notice of an informational meeting to employees. Thomas sent the notice on March 20, 1990, several months prior to the Respondent's letter.

2. In addressing the Respondent's argument that the Union was defunct, the judge indicated that the Respondent bargained with the Union for ''over a year'' after the resumption of negotiations in 1990. In fact, the parties recommended contract negotiations after a lengthy hiatus on June 28, 1990. Their last bargaining session occurred on September 25, 1990. They did not have another bargaining session prior to the Respondent's withdrawal of recognition on April 1, 1991.

[3] In adopting the judge's finding that the Respondent did not prove objective considerations supporting a good-faith doubt of the Union's majority status, we find it unnecessary to rely on: the finding that the Union's September 27, 1990 letter broke any bargaining impasse which may have existed; the judge's construction of the majority opinion in *Phoenix Pipe & Tube Co.*, 302 NLRB 122 (1991), enfd. 955 F.2d 852 (3d Cir. 1991), to be that ''a repudiation by a mathematical majority'' is necessary to establish an employer's claim of good-faith doubt; and the finding that, assuming, arguendo, employees had clearly stated their rejection of the Union at meetings with the Respondent's president, Hess, such statements were tainted and not probative because of Hess' notorious antiunion attitude.

[4] The recommended Order and notice include provisions requiring the Respondent to make whole the Union and unit employees for any losses suffered as a result of the unlawful withdrawal of recognition ''and subsequent unilateral acts.'' In the absence of any allegation or proof of unlawful unilateral changes attendant to the withdrawal of recognition, we find the recommended make-whole provisions to be inappropriate. We shall delete them.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Shopmen's Local Union No. 534 of the Bridge, Structural and Ornamental Iron Workers as the exclusive bargaining representative of our employees in the appropriate unit below described.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union the information which it requested in writing on about March 14, 1991, and which is relevant to its duties as representative of our employees.

WE WILL recognize and, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All production and maintenance employees engaged in the fabrication of iron, steel, metal and other products or in maintenance work in or about our plant or plants located in Menands, New York and Glenmont, New York; excluding office clerical employees, draftsmen, engineering employees, watchmen, guards, and supervisors.

ALBANY STEEL, INC.

Alfred M. Norek, Esq., for the General Counsel.
Mary Helen Moses, Esq. (O'Connell & Aronowitz, P.C.), Albany, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard in Albany, New York, on September 30 and October 1, 1991, on General Counsel's July 5, 1991 complaint[1] which alleges, in substance, that Albany Steel, Inc., violated its collective-bargaining obligation under Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by unlawfully withdrawing recognition from the Union, and by unlawfully failing and refusing to furnish the Union with certain information requested by the Union. Respondent's timely answer, dated July 12, 1991, admits that it has failed and refused to furnish the Union with the requested information, admits that it has withdrawn recognition of the Union as the exclusive bargaining agent of a certain unit of Respondent's employees and admits that it has refused to bargain with the Union. Respondent asserts, however, that its withdrawal of recognition and its refusal to bargain were lawful, based on the defunctness of the Union and, alternatively, on a good-faith doubt that the Union continued to represent a majority of its employees in the aforesaid unit commencing no later than the time the request for information was made. Respondent denies the commission of any unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to submit posthearing briefs which have been carefully considered.

On the entire record, including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

The complaint alleges, Respondent admits, and I find, that at all material times, Respondent, a New York corporation with a principal office and place of business in the village of Menands, State of New York, has been and is engaged in the fabrication of steel products. During the 12-month period ending July 1991, a representative period, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000 and, during the same period purchased and received at its Menands facility goods and materials valued in excess of $50,000 which were shipped directly from points outside the State of New York. Respondent concedes, and I find, that at all material times, he has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, but Respondent denies, that at all material times, Shopmen's Local Union No. 534 of the Bridge, Structural and Ornamental Iron Workers (the Union) has been and is a labor organization within the meaning of Section 2(5) of the Act. Respondent asserts that the Union became defunct on or about June 16, 1989 (Tr. 21). As noted hereafter, having found that Respondent failed to prove that defense, I conclude that, at all material times, the Union has been and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Pleadings*

The complaint alleges and Respondent admits that the following unit of Respondent's employees constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees engaged in the fabrication of iron, steel, metal and other products or in maintenance work in or about the Respondent's plant or plants located in Menands, New York and Glenmont, New York; excluding office clerical employees, draftsmen, engineering employees, watchmen, guards and supervisors.

Whereas General Counsel further alleges that the Union, at all material times, has been, and is, the exclusive statutory representative of unit employees for the purposes of collective bargaining under Section 9(a) of the Act, and has been recognized as such in a series of collective-bargaining agreements, Respondent admits only that Respondent and the Union have been parties to a series of collective-bargaining agreements, the most recent of which was in effect from December 1, 1985, to November 30, 1988. Consistent with its defenses, Respondent denies that the Union has been and is the exclusive representative of unit employees for the purpose of collective bargaining ''at all material times herein'' (G.C. Exh. 1(e)).

Respondent admits that on or about March 14, 1991, the Union requested, in writing, that Respondent furnish to the Union various items of information relating to (a) the names, addresses, and rates of pay of its current production and maintenance employees, (b) the cost of all monetary fringe

[1] The underlying unfair labor practice charge was filed and served on Albany Steel Inc., the Respondent, on May 22, 1991, by the Charging Party, the above-captioned Shopmen's Local Union No. 534 (the Union). The joint motion of counsel, dated January 7, 1992, to correct the official transcript, is granted.

[2] Respondent admits that its president, Peter Hess, has been and is, at all material times, its supervisor and agent within the meaning of Sec. 2(11) and (13) of the Act.

benefits, (c) whether Respondent was presently subcontracting any bargaining unit work, (d) whether it had done so since on or about December 1, 1988, (e) the nature of the subcontracted work, (f) the companies to whom the work was subcontracted. While Respondent's answer denied that the requested information was necessary or relevant to the Union's performance of its function as the exclusive bargaining unit representative, it nevertheless stated at the hearing (Tr. 21–22) that the requested information is relevant and that it had no objection to submitting the information to the Union if the Union, in fact, were the lawful collective-bargaining representative.

Respondent admits that on April 1, 1991, it withdrew recognition of the Union as the statutory representative of unit employees and that it has failed and refused, and continues to fail and refuse, to furnish the above-requested information. Respondent pleads, in substance, that it did so because, doubting both the Union's legal existence and the Union's majority representative status, it had no statutory obligation to do so. Respondent denies, therefore, that it refused unlawfully to bargain with the Union.

B. *Background*

At the hearing, General Counsel asserted, and it was not disputed, that the Union and Respondent have engaged in collective bargaining in excess of 25 years; but that in the last 3 years, the relations between the parties have not been harmonious. Peter J. Hess, Respondent's president, has been employed by Respondent since 1979, has been its chief executive officer since 1985, and since 1979, he has been in charge of negotiating collective-bargaining agreements with the Union. As president and chief executive officer, he has supervised Respondent's approximately 100 employees in five divisions: the warehouse division, employing 50 or more employees; its fabrication division, employing about 20 employees; its fastener division employing about 6 employees; its reinforcing bar division, employing about 4 employees and its machine shop division (Asisco Division), at a plant in nearby Selkirk, New York, employing about 20 employees. Respondent and the Union, on or about December 1, 1985, executed a collective-bargaining agreement covering the 100 unit employees which agreement expired on November 30, 1988.[3]

Commencing in the period about 2 months before expiration of the 3-year collective-bargaining agreement (November 30, 1988), Respondent, principally through its president, Peter Hess, engaged in various unfair labor practices in dealing with both unit employees and the Union. Based on the Union's unfair labor practice charges filed thereafter, General Counsel issued a complaint alleging violations of Section 8(a)(1), (3), (4), and (5) of the Act. Following 7 days of hearing in Albany, New York, between February 6 and April 5, 1989, Administrative Law Judge Eleanor MacDonald, on March 13, 1990, found that, as alleged, Respondent had committed numerous serious violations of Section 8(a)(1), (3), (4), and (5) of the Act. In particular, Judge MacDonald consequently ordered Respondent to cease and desist from:

> (a) Suspending employees, informing employees that they may not return to work from disability and refusing to reinstate them after disability because of their union activities.
>
> (b) Discharging its employees because they support the Union and because they file charges and give affidavits to the NLRB.
>
> (c) Failing to pay bonuses to its employees because of their union activities.
>
> (d) Refusing to comply with the Union-security provisions of the collective-bargaining agreement.
>
> (e) Unilaterally implementing collective-bargaining proposals without the consent of the Union absent a valid, preexisting impasse in bargaining.
>
> (f) Refusing to bargain with the Union pending the outcome of a decertification effort and failing to bargain in good faith with the Union.
>
> (g) Assisting, encouraging and sponsoring the employees to decertify the Union.
>
> (h) Promising employees improved benefits and working conditions and promising to redress grievances if the Union is decertified.

In addition, Judge MacDonald ordered Respondent affirmatively to:

> (1) On request bargain with the Union as the exclusive representative of employees in the appropriate unit [the same unit as appears in the instant proceeding].
>
> (2) Offer [union president] Michael O'Connell immediate and full reinstatement to his former job [from which he was unlawfully terminated] and make him whole for loss of earnings resulting from the discrimination against him [unlawful discharge].
>
> (3) Make whole Michael O'Connell, Raymond Ashley [union officer] and Frank Turner [shop steward] for any loss of earnings and benefits suffered as a result of their unlawful suspensions and as the result of the unlawful refusal to reinstate Michael O'Connell after his absence for disability.

Prior to the issuance of Judge MacDonald's recommended Decision and Order of March 13, 1990,[4] the Union, on September 27, 1989, filed a further unfair labor practice charge (Case 3–CA–15201) alleging violation of Section 8(a)(1) and (5) of the Act, because of Respondent's refusal to provide the Union with certain information, requested on or about August 16, 1989. Complaint duly issued on November 1,

[3] The collective-bargaining agreement contains union-security and checkoff clauses. The union-security clause requires, as a condition of employment, unit employees to be or become a union member not later than the 31st day following the beginning of employment or the effective date of the agreement whichever is later, and to remain of the union in good standing to the extent authorized by Sec. 8(a)(3) of the Act. The agreement also contains a three-step grievance procedure terminating in arbitration. The grievance machinery (G.C. Exh. 2, p. 19, et seq.) places union shop stewards in prominent roles. Shop stewards, under the collective-bargaining agreement, are appointed by the Union from among members employed by Respondent.

[4] Respondent failed to take exception to Judge MacDonald's recommended Order of March 13, 1990, and, on May 30, 1990, the Board issued its pro forma Order adopting the findings and conclusions of Judge MacDonald, directing that Respondent, its officers, agents, successors, and assigns, take the action set forth in the recommended Order.

1989, and that case was heard by Administrative Law Judge Joel P. Biblowitz in Albany, New York, on December 5, 1989. Before issuance of Judge MacDonald's recommended Decision and Order, Judge Biblowitz issued his recommended Decision and Order on February 5, 1990. He found Respondent, as alleged, in violation of Section 8(a)(5) of the Act and directed Respondent to cease and desist from refusing to bargain in good faith and to promptly furnish the Union, as had been requested, with the names, addresses, dates of hire, job classifications and rates of pay of all production and maintenance employees.

Judge MacDonald, thus having in hand Judge Biblowitz' February 5, 1990 decision and recommended Order, found, on March 13, in the case before her, that Respondent had engaged in ''egregious misconduct demonstrating a general disregard for the employees' fundamental rights and . . . a proclivity for violating the Act [see *Albany Steel*, supra].

Judge MacDonald's findings (in a case demonstrating Respondent's unlawful discharge and layoff of unit employees, and Respondent's failure to bargain in good faith with the Union in various respects) included a finding of Respondent's (Hess') unlawful sponsoring of a decertification movement among its unit employees.

In her finding of Hess' unlawful sponsorship of employee decertification activities, Judge MacDonald referred to President Hess' less than cordial feelings in dealing with both unionized employees and the Union as their collective-bargaining agent. Despite 10 years' of collective-bargaining experience with the Union and his admitted formal academic training in labor relations (Tr. 463), Peter Hess made no secret of his union animus. During his unlawful sponsorship of the decertification movement, he told employees that they would be better off without a union, that the decertification movement was a ''great idea'' (G.C. Exh. 3(A), p. 18), and that he anticipated that the Union would be out of Respondent within a month's time following the decertification vote. When, at a late 1988 meeting with employees, an employee then asked him why he was so antiunion, Hess frankly replied that he ''hated the fucking Union'' (G.C. Exh. 3(A), p. 18).

At a further employee meeting, President Hess apparently felt obliged to clarify and particularize his animus so that unit employees would suffer no misapprehension concerning his subjective state of mind in dealing with the Union. Thus, when employees at the meeting asked him why he did not get along with the Union, he first blamed the Union for graffiti, vandalism, grievances, and an OSHA inspection and then told the employees that ''when union officials finally get ready for our very first meeting, I'm in a frame of mind where I want to pick them up and throw them out the window and we haven't even started negotiations'' (G.C. Exh. 3(A), p. 19).

In the hearing before Judge Biblowitz, one of Respondent's defenses for its failure to supply relevant information requested by the Union was Hess' testimony in which he denied having received the Union's request at all. Although the Union's request had been dispatched in certified mail,[5] correctly addressed to Respondent and received by Respondent's agent, President Hess testified that he suspected that the envelope might have been addressed to someone other than himself; that this device was actually a means of Union deception whereby the Union could claim that Respondent received the information request whereas it actually had not found its way into Respondent's possession. Judge Biblowitz found Hess' testimony to constitute ''pure speculation'' and ''unwarranted''; found the Union's supporting witness [Thomas] to be ''very credible and articulate''; and found Hess' testimony, that Union Administrator Thomas would purposely misdirect the letter in order to go through a Board hearing, thereby delaying for a year or two his receipt of this requested information, to be ''preposterous.'' (Administrative Law Judge Biblowitz' decision.)

On April 9, 1991, the Region found that Respondent had complied with the affirmative requirements of [Judge MacDonald's] Board Order and closed the consolidated cases subject to Respondent's continued observance of Judge MacDonald's order (G.C. Exh. 32).

C. *The Union Placed Under Administration June 16, 1989*

While the record is unclear concerning the dates of incumbency, there is no dispute that James Gethins, prior to June 16, 1989, had been president of the Local Union. He was succeeded by Michael O'Connell who was president prior to and during the unfair labor practice hearings before Judge MacDonald. During his incumbency, James Gethins was charged with embezzlement of local union funds and was under investigation by the United States Department of Labor. On June 16, 1989, in the presence of the alleged embezzlement, the approaching contract negotiations with Respondent and the recently closed unfair labor practice hearings before Judge MacDonald, the general executive board of the International Union, under the International constitution, issued a unanimous decision, effective July 1, 1989, whereby (a) all offices of the local union were declared vacant; (b) all business affairs of the local union were to be administered by Robert S. Thomas, designated as administrator of the local union; and (c) all officers of the local union were instructed to surrender all funds, assets, and property of the local to Administrator Thomas who would thereafter administer its affairs. An acting local president (employed by a neighboring employer) was named. This decision was made known by a letter to each member of the local and was signed by the International officers (G.C. Exh. 33).

On July 8, 1989, Administrator Robert S. Thomas notified Respondent that the general executive board of the International Union had designated him as administrator and that all matters relating to the Local Union should be directed to him at an Albany, New York address (G.C. Exh. 5).

D. *The Instant Case*

Following Administrator Thomas' July 8, 1989 notification to Respondent that he was named administrator and that Respondent should deal with him concerning the Local Union's affairs, there then follows a 9-month hiatus in any communication or other relationship, on this record, between the parties.

On April 17, 1990, with no Respondent exceptions filed, the Union wrote to Respondent (G.C. Exh. 6). Citing the

[5] All written communications between Respondent and the Union, on this record, are solely via certified mail with attendant proof of receipt.

issuance of Judge MacDonald's March 13, 1990 bargaining order, the Union requested Respondent to commence contract negotiations. The Union's request for bargaining did not result in agreement of the parties concerning the place and other mechanics of bargaining until on or about June 21, 1990.[6] The ensuing collective-bargaining sessions starting June 28, 1990, were on an amicable basis (Tr. 399).[7] Respondent did not question the Union's representative status. Administrator Thomas, the Union's chief spokesman, was often accompanied by one or more of the three shop stewards, William Ziman, Frank Turner, and Ben Bylo (G.C. Exh. 35). Respondent was represented by Peter Hess as chief spokesman; Attorney Mary Helen Moses; Plant Manager Mark Flanagan and Supervisors Watson and Dmyszewicz (G.C. Exh. 35). Hess described the status of prior negotiations because Thomas had not participated in the prior negotiations, the last of which had occurred on March 6, 1989, during Judge MacDonald's unfair labor practice hearings (G.C. Exh. 35). The unresolved issues included wages, the employee evaluation bonus, the term and expiration date of the contract, dues checkoff, and union security (Tr. 64–66). During the June 28 session, Respondent made a contract proposal on which Thomas requested time for analysis.

At the July 18, 1990 session, the Union rejected Respondent's proposal without making one of its own.

At the July 31, 1990 meeting, the meeting broke up after Hess had given Thomas further information concerning the status of negotiations at prior meetings, much of which he had previously provided to Thomas. In any event, the bargaining climate at the meeting grew hot and Thomas walked out, canceling all future meetings (Tr. 400).

There followed an exchange of letters between the parties whereby they agreed to return to the bargaining table on August 29, 1990. That session, according to Hess, was amiable and resulted in a written union contract proposal (Resp. Exh. 2). Respondent, following a 2-hour lunch break, rejected the Union's proposal but returned with a counterproposal (R. Exh. 3). Hess analyzed Respondent's counterproposal, showing that Respondent had accepted 8 of 10 of the Union's original proposals and that the principal obstacle to agreement was the Union's insistence on a union-security clause. With regard to further bargaining, Thomas then told Hess that he could not meet during the following month but during that time the Union would think about and report at the next meeting, set for September 25, on Respondent's counterproposal. (Tr. 405–406). Thomas admitted at the hearing that, at the August 29, 1990 meeting, he had accepted Respondent's offer of 3 percent and 4 percent wage increases for the first 2 years of a proposed agreement but testified that such agreement was tied to the Union's package proposal, presented at the previous meeting, particularly its demand for a union-security clause (Tr. 70).

At the September 25, 1990 collective-bargaining session, although other minor matters may have been changed, it is undisputed that the union presented a different union-security clause, (maintenance of membership) changed the requested expiration date, from November 30 to October 1 (which Hess regarded as a critical change (Tr. 409)), but now also insisted that the wage increase be increased in the first year from 4 percent to 5 percent and in the second year from 3 percent to 4 percent. Hess told Thomas that he felt that they had already reached agreement on wages but that now the Union was going in the opposite direction (Tr. 410). Thomas replied that the Union's prior proposal, including the apparently objectionable union-security clause, was part of a package and that, with the Union now proposing a modified union-security clause, all the terms and conditions of prior bargaining were up for renegotiation (Tr. 410–411). When Attorney Moses questioned Thomas about the meaning of the modified union-security clause, particularly the meaning of ''membership in good standing,'' Thomas failed or refused to answer the attorney's questions. According to Thomas, the principal issue, however, was Hess' insistence that there be no union-security clause at all (Tr. 74). Thomas admitted that Hess accused the Union of changing its wage proposal but Thomas told him that the Union's changed wage proposal was a result of the Union's agreeing to a substantial change in the union-security provision (Tr. 75); and that if the new union-security clause was unacceptable to Respondent, the Union was prepared to withdraw its entire proposal (Tr. 75-76). When Administrator Thomas then asked Hess if he had any response or further proposal, Hess told him that Respondent's proposal was on the table and that Respondent had no further proposal to make, and that the parties were at impasse.

After Hess said he was not prepared to make any further proposals and Thomas said that he was not making any further proposals either (Tr. 76), the meeting ended when Thomas picked up his papers, got up and walked out of the door (Tr. 76). Although several of the Union's shop stewards testified at the hearing, they did not corroborate Thomas' contrary version of how the September 25, 1990 collective-bargaining session ended. Rather, I credit the testimony of Peter Hess, as corroborated by Supervisor William (Bill) Dmyszewicz, that Thomas left the room after gathering up his papers; was shortly followed by the other union bargainers (Turner, Ziman, and Bylo, all of whom testified and none of whom corroborated Thomas); who were shortly followed by Hess who also left the room. If the matter were significant, I would find that Administrator Thomas left the room in an emotional state, having been rebuffed by Hess' rejection of both the new union-security proposal and the increased wages that Thomas proposed. Upon both sides agreeing that neither side had further proposals to make and Hess having stated that the parties were at impasse, it was this state of affairs that propelled Thomas to gather up his papers and to leave the meeting. I also credit Hess' testimony that he then trailed Thomas out of the meeting, asked him if they were through and Thomas told him not only that he was through, but he was not negotiating any further (Tr. 412). Hess then returned to his bargaining committee and told them that Thomas was not returning.

On the same day that Thomas walked out of the meeting, September 25, 1990, Respondent addressed a letter to him memorializing that the Union's proposal had been presented at that September 25 meeting and, upon Respondent's rejection, the Union withdrew its proposal (G.C. Exh. 23). In addition, the letter observes, and Thomas admits (Tr. 78), that

[6] The record is replete with further communications between the parties, a union unfair labor practice charge (subsequently withdrawn) and ultimate agreement of the parties to meet on and after June 28, 1990, in collective bargaining.

[7] The dates of subsequent bargaining sessions are: July 10, 18, and 31, August 29, and September 25, 1990.

the parties had previously already agreed to further bargaining sessions on October 2 and 3, 1990. Respondent, in the letter, states that it continued to hold those dates open for collective bargaining (G.C. Exh. 23).

After walking out on September 25, but before the approaching October 2 and 3, 1990 collective-bargaining dates, Thomas sent a letter, by certified mail (G.C. Exh. 24) to Respondent on September 27, 1990. Thomas' September 27 letter, according to the stipulation of the parties (Tr. 81–82), was received by Respondent before October 2, 1990.[8] That September 27 union letter to Respondent states, inter alia, that (1) the Union's complete contract proposal was rejected by Respondent; and (2) Respondent declared that the parties had reached impasse notwithstanding Respondent's refusal to present any further proposals. In particular, Thomas' letter to Respondent further states:

> Be advised that we are prepared to continue negotiations and we are prepared to submit and discuss proposals in an attempt to resolve the many issues that have not been resolved.
>
> Please advise the undersigned at the above return address whether or not you intend to continue negotiations.
>
> Sincerely,
> Robert S. Thomas
> Administrator

To the extent Hess testified (Tr. 413) that he did not receive Thomas' September 27, 1990 letter (expressing both the Union's desire to negotiate further and its willingness to submit and discuss proposals) until 1 month after Respondent had sent its September 25 letter (G.C. Exh. 23) to the Union, I specifically discredit Hess' testimony. This necessarily follows not only from the stipulation of the parties (that the Union letter was received before October 2) but by the record evidence that it was received, indeed, on October 1, 1990, within a week after Hess' September 25 letter to the Union (G.C. Exh. 23). This discredited testimony was elicited for the apparent purposes of showing Respondent's innocence in keeping open the October 2 and 3 bargaining dates and the Union's indolence and lack of bargaining interest. Since Respondent received the union letter before the scheduled October 2 and 3 negotiating dates there could be no inference that the Union's failure to appear on those dates signalled the Union's desire to refrain from further bargaining.

Thomas testified, and I credit his testimony, that he did not appear at the October 2 or 3 collective-bargaining sessions, previously agreed upon, because of the bargaining heat generated at the September 25 meeting, albeit that he generated much of it. His judgment was that it would be better to ''let things cool down before you go at it again'' (Tr. 79). I credit this testimony notwithstanding that Thomas testified that he discussed this strategy (Tr. 79–80) with his shop stewards (Bylo, Turner, and Ziman) and none of these shop stewards corroborated such testimony. I reject Respondent's argument that Thomas' tactics were designed to thwart good-faith bargaining; but even if true, his tactics are not persuasive on the issues presented herein.

Hess testified that after he received Thomas' September 27 letter (G.C. Exh. 24) requesting further bargaining with Respondent (Tr. 418-419), Respondent never heard from Thomas again until March 1991 when Respondent received his request for information concerning Respondent's current employees and its subcontracting of unit work (G.C. Exh. 30, Mar. 14, 1991), the requests which triggered the instant complaint. I also discredit this further Hess testimony. It appears that on or about September 17, 1990, Respondent was obliged to initiate a drug testing program for its drivers (G.C. Exh. 27). In response to a memorandum concerning this program to employees posted by Respondent in the plant on or about September 17, 1990 (G.C. Exh. 27), the Union wrote to Respondent on or about December 15, 1990, opposing unilateral random drug testing of unit employees (G.C. Exh. 26). The Union's December 15 letter shows that it was delivered to Respondent on December 21, 1990 (G.C. Exh. 26, p. 2). Thus, Hess' testimony that he did not hear from the Union between his receipt of the Union's September 27, 1990 request for further negotiations and March 1991 is inconsistent with and undermined by Hess' receipt of the Union's December 15, 1990 written objection to Respondent's drug testing program. The Union's letter necessarily is indicative of a desire to protect employee interests regardless of the merits of the Union's position.

On or about March 20, 1990, Thomas sent a notice of an ''informational meeting'' to unit employees of Albany Steel to be held on March 28, 1990 (G.C. Exh. 36). In addition, Thomas testified (and the shop stewards corroborated) that in the hiatus between the last collective-bargaining session on September 25, 1990, and March 1991, Thomas held five or six ''informational meetings'' with his shop stewards and ordinarily with about a dozen employees. At the March 28, 1990 meeting, following issuance of Judge MacDonald's decision, about 36 employees attended (Tr. 261–262). These meetings were held both in the union hall and in Thomas' Albany hotel room (Tr. 94–98).[9] In addition, Thomas had been holding meetings of the Local's members employed by other employers in the area. As a result of those meetings, a collective-bargaining agreement was negotiated between the Local Union and one of the Albany area employers. I agree with Respondent's arguments that Thomas' testimony concerning these meetings and particularly the number of Respondent's employees present was not persuasive. I find, however, that there were some meetings at which shop stewards and a small number of Respondent employees attended.

By the time Thomas sent the March 20 notice of an ''informational meeting'' to unit employees, he already knew, from a Respondent letter of November 27, 1990 (G.C. Exh. 25), that Respondent considered the Union's continued silence to be a demonstration of the parties continued ''impasse'' and that Respondent notified him of its intent to place in effect its proposed wage increases which had been, and which remained, on the bargaining table as of September 25, 1990. Those wage increases would be effective December 3, 1990 (G.C. Exh. 25). Respondent noted, in its Novem-

[8] In fact, Respondent received the Union's September 27 certified letter on October 1, 1990, according to the Postal Service green card apparently signed by Hess himself (G.C. Exh. 24, p. 2).

[9] Turner and Bylo are shop stewards at the main warehouse facility in Menands, New York. Ziman is the shop steward at Respondent's Asisco (machine shop) facility in nearby Selkirk, New York (Tr. 99).

ber 27, 1990 letter, that the Union's silence and its unwillingness to make further proposals indicated that there was no realistic possibility that a continuation of bargaining at this time would be ''fruitful'' (G.C. Exh. 25). The Union took no action concerning Respondent's proposed unilateral implementation of the wage increases. Indeed, Administrator Thomas admitted that, knowing of these proposed unilateral wage increases, he decided to have them go into effect because the employees had not received a wage increase for a year.

About a week prior to the time that Respondent dispatched its March 20 letter to unit employees notifying them of the March 28 informational meeting (G.C. Exh. 36), it sent two letters, both dated March 14, 1991, to Respondent (G.C. Exh. 29, 30). In the first, noting its position as exclusive collective-bargaining representative of all production and maintenance employees, the Union requested that Respondent submit a current list of unit employees, including dates of hire, classification, hourly wage rate, and home address, and also the amount of the Respondent's current costs of all monetary fringe benefits including medical premiums (G.C. Exh. 29).[10] Its other letter (G.C. Exh. 30), again noting its position as exclusive collective-bargaining representative, requested information concerning whether Respondent was presently subcontracting any [unit] work; whether any such subcontracting occurred since December 1, 1988 (i.e., after expiration of the last collective-bargaining agreement); and the nature of the work subcontracted together with the names of the employers to whom the subcontracting had been awarded.

Respondent answered these requests for information on April 1, 1991 (G.C. Exh. 31), the text of which reply is:

> Dear Mr. Thomas:
>
> You have requested, as the collective bargaining representative of our employees, that we supply you with certain information.
>
> At this point, it is our belief that your union no longer represents a majority of the employees in the unit. We base this belief on a number of facts:
>
> 1. You walked out of negotiations on September 25, 1990, when you refused to accept our last proposal (much of which embodied a prior proposal made by you). At that meeting, you stated unequivocally that you had no more proposals for Albany Steel.
>
> 2. By letter dated September 25, we notified you that we were prepared to continue negotiations on October 2 and 3, dates to which you had already agreed, and any other dates which you might have available. You have not asked for any negotiation dates; you did not appear for the October 2 and 3 meetings.
>
> 3. On November 27, we informed you by letter that we intended to implement a wage increase based on our proposal which was on the table September 25. You did not respond to the letter. The wage increase was implemented.
>
> 4. You have not responded in any way to our offers to negotiate indicated above.
>
> 5. It is our understanding that the union is no longer holding meetings.
>
> 6. We are not aware of there being any employees who are designated as shop stewards, and we are not aware of any efforts on the union's part to police employee rights in over a year.
>
> 7. It is our understanding that Local 534 no longer has officers, and is essentially defunct as a local.
>
> 8. It is our understanding that very few, if any, of our employees have remained members of the union, that none are paying dues, and that most employees of Albany Steel believe that they are not represented by a union.
>
> In light of these facts, as well as the fact that the employees of Albany Steel have been working without a contract since December 1, we believe that Local 534 no longer represents a majority of the employees in the designated unit. We believe that we have negotiated in good faith with the Union's bargaining team, while it existed, and have more than complied with the Board's bargaining Order issued last year.
>
> On this basis, we are refusing to supply you with the requested information.
>
> Sincerely,
>
> Peter J. Hess
> President

Following this April 1, 1991 reply, which Respondent's answer admits was a withdrawal of recognition, the Union filed an unfair labor practice charge on May 22, 1991, which was followed thereafter by issuance of the instant complaint.

At the hearing, as above noted, Respondent conceded that the information requested by the Union was relevant and, as I understood Respondent, essentially conceded that Respondent's failure to supply the requested information would constitute a violation of Section 8(a)(5) of the Act but for Respondent's defenses to the obligation to supply such information: (1) that the Union, commencing June 16, 1989, was defunct; and (2) that, in any event, Respondent, at least as early as April 1, 1991, had a good-faith doubt of the Union's continued status as the majority representative of Respondent's unit employees and therefore was under no obligation to supply the information.

E. *Respondent's Defenses*

1. The Union was defunct commencing June 16, 1989

Respondent's opening position with regard to the Local Union ''defunctness'' was apparently based on the International Union's causing the dismissal of all local union officers and the substitution therefore of an administrator (Robert Thomas) on June 16, 1989. Respondent has failed to submit authority which might indicate that the mere assumption by an International Union of the affairs of an affiliated local union through an administrator per se constitutes defunctness of the Union. Cf. *Bickerstaff Clay Products*, 286 NLRB 295, 299 (1987), *Waikiki Plaza Hotel*, 284 NLRB 23 fn. 1 (1987). Commencing June 16, 1989, when Robert Thomas assumed the legal position of local union ''Administrator,'' and July 8, 1989, when he notified Respondent thereof (G.C. Exh. 5),

[10] This request was similar to the Union's August 16, 1989 request, Respondent's rejection of which formed the basis of Judge Biblowitz February 5, 1990 finding of a violation of Sec. 8(a)(5) (G.C. Exh. 3(B)). Thomas needed the subcontracting information in order to intelligently continue to bargain.

he, rather than elected officers, appears to have carried out the affairs of the Union with all union authority and funds placed in his hands. Whereas, for instance, the collective-bargaining agreement (G.C. Exh. 2, p. 19) requires that the Union inform Respondent, in writing, of the names of its members who have been appointed shop stewards, there is no indication that Thomas notified Respondent that there were no shop stewards or that existing shop stewards had lost their offices. In addition, although Respondent argues that its engaging in collective bargaining was under the aegis of a Board order compelling such bargaining, it nevertheless failed at any time to apprise either the Union or the Board of its position that it was dealing with a defunct labor organization and had no obligation to do so. To the contrary, it continually thereafter bargained with the Union for over a year, and, through November 1990, was at all such times prepared to sign a collective-bargaining agreement with the Union. No sign of union defunctness there.

Furthermore, as will be seen in later discussion, Respondent continued the practice of administering discipline to its employees only in the presence of union shop stewards, which practice apparently exists to the time of the present hearing. Moreover, the evidence shows that Robert Thomas, on behalf of the Local Union, has been engaged in, and is engaging in, at all material times, the negotiation of collective-bargaining agreements not only with Respondent, but with nearby employers engaged in the warehousing and distribution of iron and steel products. Thus, insofar as Respondent suggests and argues that the Union is defunct in the sense that it has lost its existence, the evidence is all the other way. Respondent's argument for union defunctness, relying on the mere loss of local independence, in the sense of the local union having its own elected officials and the substitution by the International of an administrator, is a legally and factually untenable position. Substantial changes in local union hierarchy are not the death knell of the local, certainly not a basis for inferring defunctness in the present case. Certainly not where Respondent recognizes the administrator and the Union's erstwhile stewards as its opposite number in continuous, subsequent bargaining. Compare: *Bickerstaff Clay Products*, 286 NLRB at 299; see *Robinson Bus Service*, 292 NLRB 70 (1988).

During the hearing, Respondent appeared to switch its position so that the claimed ''defunctness'' was not directed to the Charging Party's total loss of a factual and legal identity; rather, whatever its existence and activities elsewhere, its existence allegedly ceased in Respondent's two facilities. Even that argument, however, is not supported on the facts. In the first place, whether or not Respondent was bargaining with the Union under the obligation of a Board order, as it claimed, as late as September 25, 1990, in the last collective-bargaining session (G.C. Exh. 35), it was nevertheless fully prepared to sign a collective-bargaining agreement with the Local Union. An employer does not ordinarily execute a collective-bargaining agreement governing a relationship directed at its 100 employees with a defunct union. Furthermore, as in its claim of absolute defunctness, Hess never suggested to Thomas (or to anyone else), at any time, that he was negotiating with a chimera or a ghost. Respondent never suggested to the NLRB Regional Office (with whom it was in constant contact, supplying it with copies of its correspondence with the Union) that the Union was moribund, much less that it actually was defunct. Moreover, the testimony of Plant Manager Martin Flanagan demonstrates that as late as August 1990, more than a year after the claimed June 16, 1989 defunctness, in administering discipline to a truckdriver employee (O'Keefe, Tr. 356), he inquired whether O'Keefe wanted his shop steward present prior to the formal discipline. Long after the November 1988 expiration of the contract, Flanagan has continued his practice of causing the Union's shop stewards to be present when disciplining unit employees even through the time of this hearing (Tr. 369-373). In addition, Flanagan admitted that it was possible, following his normal procedure, that he nevertheless informed the Union, as late as August 1990, that he had disciplined a unit employee even though the employee had specifically rejected Flanagan's suggestion of the presence of the shop steward (Tr. 374). Such consistent engagement of union representatives in plant discipline demonstrates not only the vitality of the Local Union but Respondent's affirmation of that vitality by requiring or insisting on the participation of the bargaining representative in the statutory affairs of unit employees.

Furthermore, Fabrication Shop Manager William Dmyszewicz admitted that while he and the union members of the plant safety committee (Shop Steward Turner, Union Officer Ashley together with employee Holmes) had not met since July 1989, he nevertheless regarded the union members of the safety committee as continuing to be the representatives on that committee; and that it was his present intention to have further meetings of the safety committee (Tr. 348–349). and union representatives have continually pressed for meetings (Tr. 216 et seq.) As Respondent's safety officer, he conceded that the failure to convene further meetings was a matter of his own negligence (Tr. 347), rather than union neglect. Lastly, the Union also protested the implementation of Respondent's drug testing program in December 1990 (G.C. Exh. 26). This is not evidence of defunctness.

Under these circumstances, I conclude that Respondent has failed to prove that, at any material time, the Union was ''defunct'' either in the sense (1) that it no longer had a factual or legal existence; or (2) that it was sufficiently moribund in Respondent's facilities as the representative of employees in the production and maintenance unit so that it could be successfully and lawfully disregarded as the statutory representative. The actions of the Union and Respondent's supervisors and bargainers are directly to the contrary.[11]

[11] The evidence is in dispute when the Union posted on Respondent's bulletin boards notices of meetings of its members. Thomas testified that he was told that the March 20, 1990 notice of an informational meeting was posted (G.C. Exh. 36). There was no direct corroboration of this fact. Perhaps one of the reasons for the difficulty of proving the bulletin board posting of union notices is that while employees see them from time-to-time, they ''don't last very long . . . they just get taken down'' (employee John Musella, Tr. 327).

2. Respondent's good-faith doubt of Union's majority status

Respondent's alternate, and perhaps principal, defense,[12] as I understand it, was its assertion that certainly no later than April 1, 1991, it had a reasonably based good-faith doubt of the Union majority representative of the unit employees. As above noted, Respondent, on April 1, 1991, refusing to supply requested relevant information, formally notified the Union in writing of its reasons for entertaining a belief that the Union no longer represented a majority of the employees in the unit (G.C. Exh. 31). Respondent's answer admits that this constituted a withdrawal of recognition of the same date.

(1) The first listed reason was that the Union walked out of the September 25, 1990 negotiations, refused to accept Respondent's last proposal, and stated that it had no more proposals for Respondent.

The most that Respondent is arguing that the Union refused to advance further proposals and that the parties were at impasse. Impasse, however, is not a basis on which to doubt the Union's representative status. *Valley Kitchens*, 287 NLRB 686, 690 (1987). While the Board is not bound by a party's expression that the negotiations are at impasse, *Westchester County Executive Committee (Builders Institute)*, 142 NLRB 126, 127 fn. 2 (1963); *Pillowtex Corp.*, 241 NLRB 40, 46 fn. 11, enfd. 615 F.2d 917 (5th Cir. 1980), I will assume, arguendo, that the parties were actually at impasse especially since the Union was adamant in its position and Respondent, in its September 25, 1990 letter to the Union claimed that the Union had rejected its final offer and the Union intended to take no further proposals. Since impasse is a ''temporary deadlock or hiatus in negotiations,'' *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982), citing *Charles Bonanno Linen Service v. NLRB*, 454 U.S. 404, 70 L. Ed. 2d 256, 664 (1982), it may be assumed, arguendo, that, as of September 25, a legal impasse incurred.

Whether or not impasse occurred, at the September 25, 1990 session, however, it was surely broken by the Union's September 27, 1990 letter (G.C. Exh. 24) to Respondent (received on October 1, 1990) advising Respondent that the Union was ''prepared to continue the negotiations and . . . prepared to submit and discuss proposals in an attempt to resolve the many issues that have not been resolved . . . [and requesting Respondent to indicate] . . . whether or not you intend to continue negotiations.'' This union communication to Respondent breaks the impasse on two grounds: (a) Since, to create impasse, both parties must believe that they are at the end of their bargaining rope and that future bargaining will be futile, *Huck Mfg. Co. v. NLRB*, supra, the Union's letter to Respondent, proposing and inviting further negotiations, stating its intent to submit and discuss ''proposals'' to ''resolve the many issues that have not been resolved,'' demonstrates that the Union believed that future negotiations would not be futile. See *Huck Mfg. Co. v. NLRB*, supra, *PRC Recording Co.*, 280 NLRB 615 (1986), enfd. sub nom. *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987); and (b) anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse including the mere passage of time and particularly implied or explicit bargaining concessions. See *Gulf States Mfg. Co. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

The Union's September 27 letter (G.C. Exh. 24) also specifically requested Respondent to indicate whether Respondent intended to continue negotiations. Such a communication openly states an intent to resolve outstanding issues by further negotiations and proposals. Thus, I conclude, on the above authority, that any September 25, 1990 impasse was broken by Respondent' receipt, on October 1, 1990, of this Union's September 27 letter (G.C. Exh. 24), demonstrating a desire to bargain with implications of softening of its position. Cf. *Gulf States Mfg. Co. v. NLRB*, supra.

I have already rejected and discredited Hess' testimony (Tr. 413) that Respondent did not receive this September 27 union letter until a month after Respondent sent its September 25 letter to the Union. By October 1, 1990, having already received the Union's September 27 letter, Respondent knew of the Union's desire to bargain. But Respondent's subsequent November 27 letter to the Union (G.C. Exh. 25), alluding to the Union's failures to attend the scheduled October 2 meeting, failure to suggest further dates for negotiations, continuing union silence, impasse, and the futility of further bargaining unaccountably makes no reference to its having already received the Union's September 27 letter (demonstrating the Union's desire for further negotiation to resolve the outstanding issues). I have already concluded that any impasse was broken by this Union's September 27 letter received by Respondent on October 1, 1990.

Not only is the existence of alleged impasse a non sequitur rationale for supporting an objective criterion establishing a good-faith doubt of union majority status; but, Respondent's assertion of impasse nevertheless does have significance. President Hess' testimony of not receiving the Union's September 27 letter *before* the scheduled October 2 meeting was false. He actually knew of the Union's presence through and by its express desire to negotiate. Hence it bears both on his good-faith doubt and his assertion of the Union's ''defunctness.''

(2) Respondent's *second* reason in its April 1, 1990 letter on which it bases the existence of its good-faith doubt again relies on its prior letter to the Union of September 25, 1990 (G.C. Exh. 23). That letter reminded the Union of the previously established dates for future negotiations (October 2 and October 3) and the April 1991 letter recounts the Union's failure to appear at such dates and failure to ask for any future negotiation dates. Such assertions seem to me, as above noted, to ignore perhaps the pivotal fact in this litigation: the Union's September 27 letter, which Respondent received on October 1, expressly establishing the Union's desire to continue negotiations, notwithstanding that it did not thereafter appear on the previously established dates of October 2 and October 3. Since Respondent, on October 1, 1990, knew of the Union's desire to continue to negotiate, Respondent's second reason fails to support the conclusion that the Union no longer represents the unit majority. During the hearing, Respondent also repeatedly pointed to Thomas'

[12] To the extent Respondent further defends by urging (1) a change in the Board's alleged requirement of direct evidence of employee anti representative sentiment to support a good-faith doubt defense; (2) the Board to reconsider its analysis of the ''in fact'' and ''good faith doubt'' standards for lawful withdrawing of recognition; and (3) the holding of an election, I respectfully refer Respondent to the Board.

twice abruptly leaving bargaining sessions. When the Union, however, did not appear on October 2 and 3, Respondent nevertheless already knew (on October 1) of the Union's desire to continue to engage in collective bargaining. The Union's failure to appear on October 2 and 3 and its failure to propose specific alternate bargaining dates do not here form the basis of a good-faith doubt of the Union's continued majority status. Like the first ''reason'' (impasse), this second reason is a non sequitur. This second basis for a good-faith doubt, in short, omits reference to the Union's pivotal letter of September 27, written *after* Thomas walked out of the September 25 meeting and received by Hess *before* the October 2 and 3 scheduled meetings. Again this letter evinces the Union's desire to continue to bargain in order to reach agreement. Respondent's failure to refer to it in establishing a basis for Respondent's good-faith doubt is a significant omission, a misstatement of fact.

(3) The *third* reason advanced by Respondent for its good-faith doubt in its April 1, 1991 withdrawal of recognition (G.C. Exh. 31) is the Union's silence following an alleged [but discredited] continuing impasse in the face of the notice of Respondent's intention to unilaterally implement Respondent's previously offered wage increase. The Board's rule is that unilateral implementation may be lawfully made in the face of a lawful impasse, compare: *Gulf States Mfg. Co. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983); *Intermountain Rural Electric Assn.*, 305 NLRB 783 (1991). The mere fact that the Union, with knowledge of Respondent's intentions, did not object to the unilateral implementation does not demonstrate that the Union either is defunct or that it has lost its majority status. It demonstrates that the Union, with notice, failing to claim a lack of impasse, has acquiesced in the employer's action, whether lawful or unlawful. Such union passivity hardly supports an inference that it has lost its majority status. The Union's silence of 4 months following this December 1990 wage implementation is not dispositive in view of the Union's December 1990 letter protesting unilateral implementation of Respondent's drug testing program, and its September 27 letter (G.C. Exh. 24) to Respondent, placing on Respondent the obligation to set the dates for further bargaining. Thus, the 4-month hiatus fails to show the Union's abandonment of the unit or its defunctness. *Robinson Bus Service*, 292 NLRB 70 (1988). Even a 7-month hiatus, in the absence, as here, of employee turnover, does not create an objective basis on which to doubt majority status. *Southern Wipers*, 192 NLRB 816 (1971); *King Soopers*, 295 NLRB 35 (1989).

(4) The *fourth* reason advanced by Respondent for its harboring a good-faith doubt of the Union's majority status is that the Union allegedly failed to respond to the employer's alleged offers to negotiate. Respondent points *only* to the Union's failure to show up for bargaining on October 2 and 3. The Union, I have found, crediting Thomas, failed to appear because it wanted to dissipate the heat of prior negotiations and to permit the bargaining climate to cool down after Thomas' storming out of the room on September 25. Other than Respondent's September 25 letter, it made no further offer to negotiate. The Union's September 27 letter requested negotiations. Respondent's November 27, 1990 letter (G.C. Exh. 25) to the Union, unaccountably omits reference to the Union's request to bargain and states that it is the Union's fault in failing to make further proposals and that the union silence over a 2-month period demonstrated that there was not a ''realistic possibility that a continuation of bargaining at this time would be fruitful.'' Whatever else Respondent means, this is hardly an invitation to the Union to continue to bargain. I conclude that Respondent's fourth reason for a good-faith doubt, that there was no response by the Union to Respondent's alleged offer to bargain, and that the Union failed to appear on October 2 and 3 are irrelevant. Respondent, by October 1, already knew that the Union wanted to bargain. Respondent didn't desire to bargain (''futile'') and in any event, never answered the Union's September 27 request to resume bargaining.

Furthermore, as above noted, the Union expressly (G.C. Exh. 24) placed the burden on Respondent to communicate an intention to continue negotiations. Respondent failed to do so or to supply additional bargaining dates. Starting in October 1990, Respondent was content and the Union was content with the existing hiatus in bargaining. The Union supplied the reason for that hiatus: its desire to have things cool off, even in the face of Respondent's unilateral December 1990 implementation of the wage increase. Such a state of facts does not support an objective criterion on which to conclude that the Union has lost its majority status or was defunct. I regard ''reason'' No. 4 as failing to support or establish any such inference. See *Southern Wipers*, supra; *Robinson Bus Service*, supra.

(5) The *fifth* reason for a good-faith doubt was Respondent's understanding that the Union was no longer holding union meetings. As above noted, Thomas and the shop stewards testified that there were informational meetings held in the union hall and in Thomas' Albany hotel room. There was no contrary testimony. While the argument might more appropriately support an argument for *defunctness*, it seems to me, under the instant facts, to be less probative of proof of the Union's loss of majority status. In any event, Respondent's understanding is not supported by the facts. Any serious Respondent doubt of the Union's existence, before April 1991, could have been satisfied by a telephone call, letter, or further direct inquiry to the shop stewards concerning union meetings of unit employees or of Thomas and the stewards. However, even if there had been no meetings, such a state would not support a good-faith doubt on which to withdraw recognition. *Petosky Geriatric Village*, 295 NLRB 800 (1989).

(6) The *sixth* reason for Respondent possessing a good-faith doubt of the Union's majority status is that it was not ''aware'' of any unit employees who were designated as shop stewards and, similarly, of any union effort to police unit employee rights in over a year. In support of this position, Respondent presented the testimony of several witnesses. In particular, Plant Manager Mark Flanagan testified concerning an August 1990 conversation with a unit employee, truckdriver O'Keefe. Flanagan, having serious problems with O'Keefe, decided to administer discipline. Flanagan asked O'Keefe whether he wanted a shop steward present at the time of administering the discipline. O'Keefe answered: ''What fucking steward. There is no fucking Union here.'' After this conversation, Flanagan delivered a written warning to O'Keefe with no shop steward present. Flanagan nevertheless continues the practice of not administering discipline except in the presence of the union shop steward, a practice which existed during the term of the collective-bargaining agreement and which has continued to the

present time (Tr. 372–373). He also appears to have continued his practice of notifying the Union of an act of discipline regardless of the absence of the steward.

Plant Manager Flanagan also testified concerning a conversation with Shop Steward Ben Bylo in the summer of 1990 (Tr. 357). Flanagan asked him: ''What's going on with the Union?'' Bylo responded: ''What Union?'' When Flanagan again asked him whether he was the shop steward, Bylo answered that he did not know if he was the shop steward and did not know if there was a union. Both Flanagan and Bylo were chuckling during this exchange (Tr. 358). Bylo, though a witness for General Counsel, was not recalled to deny or elaborate on this conversation. Consequently, I credit in full Flanagan's testimony on this point.

President Hess testified that for about a year (apparently a year commencing before the hearing) he was not sure whether ''we had any shop steward.'' (Tr. 426); that an employee Macki (Tr. 426) had resigned as shop steward; and that Shop Steward Bylo, as above-described, told Plant Manager Flanagan that he did not know if he was shop steward anymore or indeed whether there was a union anymore (Tr. 426). Further, Hess testified that he sent a short letter to Thomas, asking him to advise Respondent who the shop stewards were and never got a response. Although he testified that he sent the letter in the spring of 1990, Hess could not produce a copy of the letter (Tr. 427),[13] and when he failed to receive a reply from Thomas, he did not follow up the letter. Then, contradicting earlier testimony, he said that he knew that Frank Turner was the shop steward, that he continued as a Respondent employee, and that Turner was the only shop steward that he knew about (Tr. 471). In view of his earlier testimony that (1) he was unsure whether Respondent had any shop stewards (which of course was false testimony) and that (2) he received no answer to the alleged letter he wrote to Thomas in the spring of 1990 (inquiring who the shop stewards were), he was asked why he failed to question Frank Turner on the existence of union stewards when he knew him to be a union steward (Tr. 429). He testified that he did not ask Shop Steward Turner who the shop stewards were because he did not know if it was an unfair labor practice to ask him if he was shop steward. He further testified that he wanted to learn who the shop stewards were either through the Union or through voluntary conversations that he might have with his supervisors or employees (Tr. 430).

I do not credit Hess' testimony. He admitted that he knew that Frank Turner had been, and still was, a shop steward, indeed the chief shop steward in Respondent's plant. This Hess testimony (Tr. 471), again, discredits his own earlier testimony (Tr. 426) that he was not sure whether there were any shop stewards anymore. In short, all he had to do was to ask Frank Turner if he were the shop steward or if there were any other shop stewards in the plant. This Hess failed to do. Plant Manager Flanagan saw no danger in asking Ben Bylo what was going on in the Union and if he was a steward (Tr. 357–358). If Hess were actually concerned whether any such question to Turner, or to other employees, would amount to an unfair labor practice, he had only to first consult his lawyer with whom he was in direct and continuous communication all through the collective-bargaining sessions in the spring of 1990 and thereafter.[14]

In addition, Hess' testimony contradicts the testimony of Plant Manager Flanagan. If Flanagan was repeatedly seeking the presence of shop stewards (when he administered discipline) not only in 1990, but even through the time of the instant hearing, this Flanagan practice should have eliminated any doubt Hess harbored whether there were shop stewards. Such an unwavering practice would necessarily throw in doubt Flanagan's report of Steward Bylo's statement questioning whether he was still shop steward or whether there was still a union. Respondent's continued disciplinary practice of repeatedly consulting the shop stewards, in the presence of Hess' admission (Tr. 464) that the Union identified its shop stewards only when there had been a change in steward designation, demonstrates that President Hess could have no good-faith doubt concerning the Union's continued majority status based on his alleged doubt that any employees were still shop stewards. Of the enumerated reason on which his good-faith doubt of majority status was predicated, the alleged lack of knowledge of the existence of shop stewards is the least credible (G.C. Exh. 31, par. 6). Not only does it fail to support Respondent's burden to prove a good-faith doubt, but it establishes Hess' incredibility (fabrication; self-contradiction) and bad faith.

Furthermore, with regard to the Union's efforts to police employee rights during the year following the expiration of the contract, as alleged by Hess as a further basis for good-faith doubt (G.C. Exh. 31, par. 6), Hess testified that what he meant by that was that there had been no grievances filed (Tr. 430). But the invariable presence of shop stewards when Respondent's plant manager administered discipline shows that the Union was present and involved in the protection of employee rights. In view of Hess' testimony (Tr. 430) that there had been no grievances filed for 3 or 4 years, it would seem that that lengthy period existed during the term of the expired collective-bargaining agreement. If the Union was lax in filing grievances, for whatever reason, during the term of the contract, then a postcontract failure to file grievances constituted no change in the Union's practice. If there was no change in the Union's practice, then the failure of the Union to ''police employee rights'' by failing to file grievances in the year since contract expiration (November 1988) was not inconsistent with the prior practice. In such a case, such a failure could hardly excite sufficient attention on which to predicate a good-faith doubt of the Union's continued majority status or that the Union's inactivity showed that

[13] Both the Union and Respondent used only certified mail in their written communications to each other. Hess produced neither a file copy of the letter nor, more significantly, a Postal Service green-card receipt of service.

[14] In view of the above finding, I technically need not reach or decide the question whether Hess actually wrote a letter to Thomas in the spring of 1990 requesting identity of the shop stewards. The pervasive acrimony of the parties precludes Hess' failure to follow his (and the Union's) practice of using only certified mail in their written communications. Had there been such a letter, it would have been certified and there would have been a Postal Service receipt. I note, however, that Thomas, present throughout the hearing, was not called in rebuttal to deny receipt of such a letter. Were the finding necessary, I would nevertheless conclude that no such letter was sent to the Union and that Hess' testimony was a fabrication.

it had abandoned the unit. *Colonna's Shipyard*, 293 NLRB 136, 140 (1989).[15]

(7) As a *seventh* basis on which to predicate a good-faith doubt, Hess asserted that the local Union no longer had officers and was ''essentially defunct as a local'' (G.C. Exh. 31, par. 7). I have already discussed, above, the question of defunctness, in general, and the local Union's defunctness in particular. The Union maintained, and Respondent utilized, the shop stewards. Its failure to have officers is not a basis for a good-faith doubt in view of the International Union's designation of Robert Thomas as the Local administrator and especially Hess' thereafter recognizing and bargaining with Thomas in such capacity for several months, negotiating toward a collective-bargaining agreement. I therefore find that Local 534, whose affairs were administered by Thomas as administrator, and by its shop stewards, was not defunct. Its failure to have officers does not serve as a basis for Hess' good-faith doubt as to his majority status among his employees.

(8) As the *eighth* and final basis of Hess' good-faith doubt of the Union's majority status, he urged that very few if any of the employees have remained members of the Union, and that none of them were paying dues (G.C. Exh. 31, par. 8). In that same paragraph, Hess further asserts that ''most employees of Albany Steel believe that they are not represented by a Union'' (G.C. Exh. 31, par. 8).

With regard to whether employees, or any of them, have remained members of the Union, Respondent adduced proof from four employees (Molnar, Elliott, Musella, and Freeman) only two of whom (Molnar and Elliott) were unit members. Neither of them resigned from the Union (Tr. 277, 293, 309).

With regard to the failure of unit employees to pay union dues, it must be recalled that the collective-bargaining agreement with its dues-checkoff provision expired on November 30, 1988. The checkoff clause was thereafter no longer enforced by Respondent. Thomas testified that he told the employees that dues payments thereafter were voluntary (Tr. 108–109), apparently due to the fact that there was no collective-bargaining agreement. The employees no longer remitted dues to the Union. In any event, union membership and/or the failure to pay dues is not necessarily a demonstration of the lack of union support. It is union support rather than union membership or dues payment which is the crucial fact. The lack of union membership and/or lack of dues payment, even if true, does not demonstrate a lack of union support. I conclude that even if these elements were true, Respondent could not, on these facts alone, prove a good-faith doubt of the Union's continued majority status, *Stratford Visiting Nurses*, 264 NLRB 1026 (1982); *United Supermarkets*, 214 NLRB 958, review denied 524 F.2d 239 (5th Cir. 1975). The issue is whether the employees do not want the Union to represent them, rather than whether, without the benefit of a bargaining agreement, they want to pay dues to support the Union. Compare: *Phoenix Pipe & Tube*, 302 NLRB 122 (1991). ''Majority support'' refers to union representation not financial support or union membership. *Manna Pro Partners*, 304 NLRB 782 (1991); *Petoskey Geriatric Village*, 295 NLRB 800 (1989). See *Orion Corp*., 210 NLRB 633 (1974).

There was testimony, however, that before the November 30, 1988 contract expiration, most of the 30 or 40 employees on a warehouse shift did not ''want the union'' (Tr. 282). Such testimony, even if fully credited, is not probative of unit employee sentiment: for at that time, in the fall of 1988, certainly at the two meetings of September 16, 1988, Hess was engaged in unlawfully sponsoring decertification of the Union and telling employees how much he hated the Union and wanted to throw the union bargainers out of the window (G.C. Exh. 3A, pp. 17–19).

Respondent further asserts in paragraph 8, in support of a good-faith doubt, that ''most employees of Albany Steel believe that they are not represented by a Union'' (G.C. Exh. 31). In support, Respondent presented the testimony of several employees, as above noted, as well as the testimony of President Hess.

Joe Molnar, a machine operator and member of 13 years, testified that he was no longer a union member although he did not resign membership. He said he did not feel that there was a union in the shop, noting that prior to the contract expiration in November 1988, the Union was active. He said he had heard nothing from the Union for 2 to 3 years, heard of only one union meeting in 3 years and that was in July 1991. He testified (Tr. 282) that in the end of November 1988, with the expiration of the contract, 30 to 40 warehouse employees told each other that they did not want the Union; that they did not want to be union members and just wanted to be left alone (Tr. 284). These antiunion statements, as above noted, coincided with Hess' unlawful activities and antiunion statements of the most unequivocal variety. Subsequent employee statements are not probative of employee antiunion sentiment. Molnar admitted that he did not see eye-to-eye on ''anything'' with the Union and did not like Union President Michael O'Connell because there were personal problems he had with O'Connell. He testified that he had resigned from the Union twice, in two strikes had crossed the picket line, and had rejoined the Union on two occasions. Molnar's testimony that employees wanted to be free of union ''membership'' (Tr. 284) is not the same as not desiring union representation *Weathercraft Co. of Topeka*, 282 NLRB 1127, 1129 (1987).

Phillip Elliot, also employed for 13 years, was a union member before contract expiration. His testimony was unclear concerning whether before and after contract expiration he heard much conversation concerning the Union. At no time, he testified, was there much talk about the Union on the shop floor. During contract negotiations, the Union merely told the employees what its contract aims were but the employees had nothing to say about it (Tr. 298).

With regard to shop stewards, he had little relationship with them because they (the union members) were ''a clique in the back.'' He clearly testified that after November 1988, contract expiration, many of the employees talked about the Union and said they did not want the Union. This, however, was in the period of Hess' ferocious antiunion conduct. For a period of 2 years, he testified, he had not heard much about the Union, had not seen anything on the bulletin board and thought that there was no union. In cross-examination, however, he contradicted his earlier testimony that during contract terms there was talk about the Union (compare Tr.

[15] General Counsel also notes that Thomas told his stewards to use discretion in filing grievances in the absence of an arbitration provision (due to the expiration of the collective-bargaining agreement) (Tr. 100).

295–296 with Tr. 305). The only time he heard employees talk about the Union or there was talk about the Union from any source was when the employees were voting on a union contract. He said this condition existed in the 13 years of his employment and that there was no talk about the Union while the contract was in effect.

Employee *John Musella* testified that he ceased being a unit employee and became a nonunit inventory clerk in December 1990 after being first employed in May 1988; that in 1988, employees said nothing about the Union except that one had to be a union member in order to be employed (Tr. 321). He heard no conversations about the Union in his 2 years' of employment other than that above-described and he never talked to employees about the Union (Tr. 322). He recalls that in the period subsequent to his employment in May 1988, he saw union notices on the company bulletin board but observed that they did not last long on the bulletin board, ''they just get taken down'' (Tr. 327). He made no affirmative steps to resign from the Union.

Robert Freeman, a nonunit employee for the past 3 years, testified that during contract negotiations, there was always talk about the Union but nobody knew anything (Tr. 340–342). During the contract term, however, there was not much talk about the Union and this was the same pattern that he noticed during his 15 years of employment (Tr. 342).

The testimony of these employees (except for Molnar) that they do not need union representation, are critical of union representation, and are content without it—does not amount to an unequivocal desire no longer to be represented by the Union. *Phoenix Pipe & Tube*, 302 NLRB 122 (1991). As above noted, the expressions of antiunion sentiment, even if amounting to rejection of representation, lose probative value when measured against Hess' contemporaneous expressions of union animus and his unlawful activity.

Most of Respondent's evidence supporting the assertion that most employees believed that they were not represented by a union came from President Hess. Hess testified that in the fall of 1990, Respondent held eight meetings (G.C. Exh. 27) with all of its employees working the three shifts at the two company locations. These employee meetings were based on, and followed, Respondent's implementation of an employee assistance program mandated under the Federal Grievance License Law (Tr. 432) originally establishing drug testing of drivers who deliver to the property of employers having contracts with the Federal Government (Tr. 432 et seq.).

In those eight meetings of all employees, devoted to films and other materials concerning drugs and the dangers of drugs (Tr. 434), questions arose whether certain procedures were covered under the union contract, including questions concerning vacations (Tr. 435). Hess himself attended seven of the eight meetings. In those meetings, he testified, when a question was raised whether a problem was covered under the union contract, there would be a ''sprinkling of laughter around the room'' (Tr. 435), and there would be a ''discussion as to whether the Union still represented the employees or not'' (Tr. 435). From the comments he heard, Hess concluded that employees ''didn't think they were represented by a union'' (Tr. 435). When later asked specifically whether the employees discussed whether the Union no longer represented the employees, Hess denied such discussion (Tr. 438). Hess testified that his written assertion (G.C. Exh 31, par. 8) to the Union concerning the loss of union majority status was based in part on his experiences at those seven sessions which he attended (Tr. 436).

The employee meetings

Hess particularized the nature and extent of the eight meetings. Hess, present at 7 of the 8 meetings, testified that there were 12 to 14 employees at each such meeting (Tr. 437). He did not attend the eighth meeting at the machine shop at the Selkirk New York plant where there were 17 to 20 employees present. At only three of the seven meetings that he attended was the Union [''what union''] was brought up (Tr. 438–440).

Hess, in testifying that there was scattered laughter in the comments concerning the union contract and whether a particular issue was covered in the union contract (Tr. 480), said he heard employees say that they did not ''have a union'' and they inquired whether the contract was still applicable (Tr. 480–481). Hess also testified that, with the expiration of the contract, while both the union security and the dues-checkoff clauses were no longer in effect Respondent continued to apply the remaining terms and conditions of the contract (Tr. 483) except for the unilateral wage increases of December 1990. The drug program was also separately implemented (Tr. 483). Dues checkoff and union security had ceased (Tr. 484).

President Hess' testimony shows that although about 100 percent of the 100 employees attended the 8 meetings, he was not present at the meeting in the Selkirk, New York plant, with its 17 to 20 employees. Of the remaining 80 employees in the 7 meetings that he attended, the employees were addressed in groups of 12 to 14 each. As Hess admitted, in only three of seven meetings did the question of the Union arise. Assuming therefore that there were 14 employees at each of the 3 meetings he attended, and assuming, arguendo that everyone of the 14 employees at these 3 meetings shared in the laughter and questioned the existence of the Union and further, by their laughter, or otherwise, arguendo demonstrated antipathy to union representation, Hess could have thereby ascertained the antiunion feelings of no more than 42 or the unit employees. Under no circumstances, therefore, would his assertion that ''most employees of Albany Steel believed that they are not represented by a union'' be substantiated by what he heard at these seven meetings. Again, only a minority of the employees, on his own testimony, were heard to have demonstrated antiunion feelings. Compare: *Marina Pro Partners*, 304 NLRB 782 (1991).

Following contract expiration the Union is rebuttably presumed to continue to enjoy the status of majority representative. *AMBAC International*, 299 NLRB 505 (1990).

An employer is justified in withdrawing recognition if, at the time of withdrawal, either (1) the Union did not in fact enjoy majority support, or (2) the employer had a ''good faith'' doubt, founded on a sufficient objective basis, of the Union's majority support. *NLRB v. Curtin Matheson Scientific*, 110 S.Ct. 1542 (1990); *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428 (10th Cir. 1990). For the employer to avail itself of the good-faith doubt defense, the employer must produce ''objective evidence'' to substantiate his doubt of continuing majority status,'' *Johns-Manville Sales Corp. v. NLRB*, supra, quoting and citing *NLRB v. Curtin Matheson*

Scientific, 859 F.2d 362, 370 (5th Cir. 1988, Williams, J. dissenting). Whether the evidence demonstrates a sufficient basis to doubt the union status must be determined in light of the totality of the circumstances in each case. *Station KKHI*, 284 NLRB 1339, 1334 (1987).

In *Johns-Manville Sales Corp. v. NLRB*, supra, the Court of Appeals for the Tenth circuit denied enforcement of the Board's Order, 289 NLRB 358 (1988), on the ground, inter alia, that the Board's insistence on a demonstration that a majority of the bargaining unit employees made antiunion statements was a necessary element in the proof of a good-faith doubt rather than weighing the cumulative effect of all the evidence. See *Johns-Manville Sales Corp. v. NLRB*. In that case, a mathematical majority would have been around 254 employees and the employer showed that it had only approximately 204 to 211 employees demonstrating antiunion positions (ibid). The court, in *Johns-Manville*, as Respondent's brief notes, observed that Chief Justice Rehnquist, in *Curtin Matheson Scientific v. NLRB*, had spoken critically of the Board's requirement that individual employees express desires repudiating the Union in order to establish a reasonable doubt of the Union's majority status, ibid. The court of appeals in *Johns-Manville* stated that to require direct proof of employee dissatisfaction limits the availability of the good-faith doubt defense to instances where dissatisfied employees come forward and identify themselves in sufficient numbers to constitute an absolute majority. Such an approach, the court said, would leave little if anything of the good-faith doubt rule, ''effectively collapsing into the proof in fact rule, ''*Johns-Manville Sales Corp. v. NLRB*.[16]

In the recent *Phoenix Pipe & Tube*, 302 NLRB 122 (1991), enfd. 202 F.2d 273 (3d Cir. 1991), however, a majority of the Board (Members Cracraft and Devaney) in adopting the judge's finding that the employer failed to prove a good-faith doubt that a majority of the unit employees supported the Union, nevertheless relied ''solely on the fact that, assuming arguendo, the statements of 24 employees [a mathematical minority] to various of the Respondent's managers were a clear repudiation of the Union, this does not constitute a majority of the unit.'' On the date that the Respondent denied a union recognition request, there were 54 production and maintenance employees in the unit.[17]

a. *Lack of mathematical majority repudiating*

Of the 100 unit employees attending the 8 meetings, Hess attended 7 meetings. The eighth meeting was at the Selkirk plant with its 17 to 20 employees. Hess did not attend this meeting and the record does not refer to any antiunion statements among Selkirk employees known by or transmitted to President Hess. Of the remaining approximately 80 employees at the 7 meetings which Hess attended, the subjects of the Union and the union contract, were raised at only 3 of the meetings. Since Hess testified that about 12 to 14 employees attended each meeting, it follows that if every employee at each of the 3 meetings made a statement to ''unequivocally repudiate the Union,'' *Phoenix Pipe & Tube*, supra, then Hess would have heard no more than about 42 such statements. Nowhere does Respondent identify anything other than a half dozen employees or even claim that as many as 42 employees made antiunion statements, much less statements that were ''a clear repudiation of the Union,'' ibid. Certainly, Respondent does not claim to have been in possession of evidence showing that a majority of unit employees had individually, collectively, in groups or otherwise voiced ''clear repudiation of the Union'' whether by vote, petition, oral statement, or otherwise.

In 1990, the Supreme Court in *NLRB v. Curtin Matheson Scientific*, 110 S.Ct. 1542, 1550 fn. 8, made certain observations relevant to the above issue. In 1991, the Board, mindful of the Supreme Court's statements, issued its Decision and Order in *Phoenix Pipe & Tube*, supra. In rejecting the employer's claimed good-faith doubt in *Phoenix Pipe & Tube*, the Board majority made it clear that it was relying *solely* on the employer's failure to prove that a mathematical majority of unit employees had repudiated (''clearly repudiated'') the Union as their representative.

I am an agent of the Board and bound by the Board's interpretations and rulings, *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). *Phoenix Pipe & Tube* states the law: a failure to prove a repudiation by a mathematical majority rebuts an employer's claim of a good-faith doubt that a unit majority supports the union, any contrary position of *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428 (10th Cir. 1990) notwithstanding. Thus, solely on *Phoenix Pipe & Tube*, Respondent failed to prove its good-faith doubt to the extent that it suggests that it showed that majority of unit employees rejected union representation. Respondent's disapproval of the Board rule should be addressed to the Board rather than to me.

b. *Employee statements were not ''clear'' or ''unequivocal'' repudiations of union representation*

Assuming, arguendo, that Hess heard statements from a unit mathematical majority, nothing he heard, according to his testimony, amounted to a ''forthright rejection of union representation'' (Chairman Stephens, concurring in *Phoenix Pipe & Tube)*, or ''a clear repudiation of the union'' (Board majority). Much of Hess' testimony was not clear on what he actually heard. He *concluded* that what he heard led to his belief that the employees at three (out of seven) meetings who laughed and made antiunion statements were discussing ''whether the union still represented the employees or not. And I could gather from the comments and questions I was getting that they didn't think they were represented by a union'' (Tr. 435). What was this conclusion based on? What did the employees actually say? The employees laughed at the mention of the union when an employee remarked (Tr. 435, 480): ''What union?'' (in relation to whether a benefit

[16] In the instant case as noted in the text, there is no suggestion that from Hess' observation, a majority of unit employees expressed antiunion sentiments at the meetings. What Hess may have surmised is another matter.

[17] As discussed further in the text, Chairman Stephens, in *Phoenix Pipe & Tube*, citing the Supreme Court's decision in *Curtin Matheson*, supra, did not ''rely solely'' on the fact that the 24 statements of individual employees constituted less than a majority of the unit. Rather, he found that 15 of the 24 antiunion statements ''were insufficiently specific to demonstrate a clear repudiation of union representation.'' In addition, he found that nine of the unspecific antiunion statements were *tainted* and *unreliable* because they were made to managers ''*whose own statements might lead the employees who wanted secure jobs to voice antiunion sentiments* . . . a far cry from a forthright rejection of union representation.'' (Emphasis added.)

was covered in the expired contract) (Tr. 435); or another would say: ''We don't have a union'' (Tr. 480). When specifically asked whether the employees, or any of them, said that there was ''no union'' ''or that the union . . . no longer represents the employees'' (Tr. 438), Hess answered only that the employees said ''what union'' (Tr. 438) and then retreated into (Tr. 438–439):

> At three meetings, the comments ''what union'' came up and at these three meetings, there was discussion that ensued which lead me to believe that they didn't think that they had a union representing them at those three meetings.

Hess also testified (Tr. 435): ''Some [employees] actually thought we didn't have a union.''

First, these conclusions are not based on what the employees said. Nothing which Hess identified as an actual statement of an employee showed that any employee was repudiating the union as his representative, certainly not ''clearly repudiating,'' *Phoenix Pipe & Tube*, supra. Second, what Hess concluded, as his testimony seems to show, was that the employees were complaining that the Union had abandoned them rather than that they repudiated the Union. But this is not a ground on which Respondent withdrew recognition. Thus, employee laughter at the mention of the Union, their taunts of ''what union,'' and their questions whether the contract terms were still in effect may well have demonstrated anger over union inactivity or passivity.[18] They demonstrate no repudiation of the Union by the employees. Third, even if these statements show employee discontent, anger and contempt for the Union, they do not meet the Board's standard of ''clear repudiation.''

c. *Even if employee statements amounted to ''clear'' repudiations of a unit majority's desire for continued union representation, they do not constitute dependable, credible evidence to support Respondent's claimed good-faith doubt*

Assuming further, arguendo, that, at these three employee meetings, a majority of unit employees, by their laughter, hoots, catcalls and other manifestations of antiunion sentiment, demonstrated that they were unequivocally repudiating the Union as their bargaining representative, such employee actions do not support a Respondent's claim of a good-faith doubt of union majority status.

Following Chairman Stephen's concurring position in *Phoenix Pipe & Tube*, supra, fn. 2, with its citation of *NLRB v. Curtin Matheson Scientific*, 110 S.Ct. 1542, 1550 fn. 8 (1990) (not relying solely on failure of proof of loss of a mathematical majority), these employees' antiunion statements must be weighed and analyzed in the *context* supplied by the events. That context must be measured by the employees' being acutely aware of the sole Respondent officer who was addressing them (at these three meetings).

When employees, raising the question whether a benefit was covered by the expired union contract, were greeted with coemployee hoots of ''What union'' or ''We don't have a union,'' they all knew that any such sentiments were welcome to Hess, certainly a principal target of the remarks. Those same unit employees had recently (September 1988) had other meetings with President Hess, according to Judge MacDonald's uncontested (and now) conclusive findings. At those meetings (G.C. Exh. 3(A), pp. 17–19), when asked ''why he was so antiunion,'' Hess told the employees that he ''hated the fucking union.'' At a further meeting, when employees asked him why he did not get along with the Union, he replied that, at the bargaining table, he ''wanted to pick them up and throw them out the window.''

In *Phoenix Pipe & Tube*, supra, Chairman Stephens found significant the interviewing supervisors remarks to job applicants that the successor employer was ''opening non-union,'' so that employee responses—that they did not need a union—were tainted and could not be considered ''forthright rejection of union representation.'' See also *Marina Pro Partners*, 304 NLRB 782 fn. 1 (1991). According to Chairman Stephens, the interviewing supervisors' prior statements to the applicants ''supplied a context that cannot be overlooked'' in ascertaining whether the employees had clearly rejected union representation. The employer's mild antiunion position, in *Phoenix Pipe & Tube*, as Chairman Stephens acknowledged, was not as strong as the employer's statements in *Middleboro Fire Apparatus*, 234 NLRB 888, 894 (1978), enfd. 590 F.2d 4 (1st Cir. 1978) (''no obligation to recognize anybody''). If, concerning an employer's good-faith doubt, those *Phoenix Pipe & Tube* antiunion statements create a context which renders subsequent employee antiunion responses (to mere job interviewers) unacceptable proof of employee rejection of the Union as bargaining representative, what weight should be given, in the instant case, to ambiguous antiunion employee laughter and statements (''What union''; ''we don't have a union'') made to the company president who recently openly sought to have employees unlawfully get rid of (decertify) the Union and told these same employees that ''he hated the fucking union'' and that he wanted to throw the union bargainers ''out the window''?

In short, the employees well knew who they were talking to and knew that their antiunion remarks, if not expressly invited, were the equivalent of throwing steaks at a tiger. Antiunion remarks of employees, addressed to Hess, whether otherwise probative, are tainted, lose their probity and, under all the above circumstances in the instant case, may not be used as evidence of employee ''clear repudiation'' of the Union as their bargaining representative. *Phoenix Pipe & Tube*, supra, Chairman Stephens, concurring. Whether, and under what circumstances, proof of future employee repudiation of the Union may be deemed acceptable in the formation of a Respondent good-faith doubt, must await the facts.

I conclude that the eight bases, viewed individually or collectively, on which Respondent, on April 1, 1991, doubted the Union's majority status as unit representative, withdrew recognition, and refused to recognize, were not objectively grounded and were inadequate foundations on which to infer a good-faith doubt. It also follows that, as Respondent essentially conceded, Respondent's April 1, 1991, refusal to supply (G.C. Exh. 31) the information requested by the Union on March 14, 1991 (G.C. Exh. 30), was unlawful since based on Respondent's contemporaneously unlawful withdrawal of recognition.

[18] The shop stewards, at the plant manager's insistence, were continually and repeatedly present at employer acts of discipline. The Union had not abandoned the employees.

CONCLUSIONS OF LAW

1. Respondent Albany Steel, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Shopmen's Local Union No. 534 of the Bridge, Structural and Ornamental Iron Workers (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees engaged in the fabrication of iron, steel, metal and other products or in maintenance work in or about Albany Steel's plant or plants located in Menands, New York and Glenmont, New York; excluding office clerical employees, draftsmen, engineering employees, watchmen, guards, and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all material times, the Union has been, and is, the exclusive statutory representative of Respondent's employees in the above-described unit, within the meaning of Section 9(a) of the Act, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. Respondent has failed to establish, by objective evidence, that at any material time, it entertained a good-faith doubt of the Union's exclusive status as the majority representative of its employees in the above-described unit or that the Union is defunct.

6. Commencing on or about April 1, 1991, by withdrawing recognition of the Union as the statutory bargaining representative of the unit employees, and by then and thereafter refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit; and by then refusing to furnish the Union, on the Union's written request, information relating to (a) the names, dates of hire, classification, wage rates, and addresses of unit employees and (b) Respondent's subcontracting of unit work, Respondent thereby engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. Respondent's unfair labor practices, above-described, have a close and intimate relationship to traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and from interfering in any like or related manner in its employees' Section 7 rights and that it take certain affirmative action designed to effectuate the policies of the Act.

In particular, I shall recommend, consistent with General Counsel's request, that the Board issue a ''broad'' remedial cease-and-desist order. This is the third complaint regarding Respondent's unlawful activities and the third concerning its refusal to lawfully recognize and bargain in good faith with the Union. No matter how unhappy the prospect, Respondent must now come to terms with the Union under the Act: it must recognize and bargain in good faith with the Union, no more, no less.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Albany Steel, Inc., Menands and Glenmont, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Shopmen's Local Union No. 534 of the Bridge, Structural and Ornamental Iron Workers, herein called the Union, as the exclusive bargaining representative of its employees in the appropriate unit, below-described.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith furnish to the Union the information originally requested in writing by the Union on or about March 14, 1991, relating to a list of Respondent's current unit employees, including their dates of hire, classifications, hourly wage rates and home addresses, and the cost of all monetary fringe benefits including medical premiums paid on their behalf; and such further information requested by the Union relating to the Respondent's subcontracting of unit work.

(b) On request, bargain with the Union as the exclusive representative of its employees in the following appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees engaged in the fabrication of iron, steel, metal and other products or in maintenance work in or about Albany Steel's plant or plants located in Menands, New York and Glenmont, New York; excluding office clerical employees, draftsmen, engineering employees, watchmen, guards and supervisors.

(c) Make whole the Union and all unit employees, respectively, for any loss of contributions or pay they may have suffered by virtue of Respondent's April 1, 1991 unlawful withdrawal of union recognition and subsequent unilateral acts, if any, affecting the wages, hours, or other terms and conditions of employment of unit employees, and reimburse unit employees for any expenses resulting from Respondent's failure to make or continue contributions to employee benefit funds.

(d) Post at its Menands and Glenmont, New York facilities copies of the attached notice marked ''Appendix.''[20] Copies of the notice, on forms provided by the Regional Director for

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[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.